PARTIES:	YAMAMORI (HONG KONG) LIMITED v GEOFFREY ROBERT CLARK and MICHAEL JAMES GILLOOLY and ors.
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 111 of 1989
DELIVERED:	Darwin, 14 December 1994
HEARING DATES:	24 August 1994
JUDGMENT OF:	Kearney J

CATCHWORDS:

COMPANIES - company removed as defendant to action when its deregistration became known to Court of Appeal - later re-registered on an ex parte application - later application by plaintiff to join company as defendant retrospectively - Limitation defence now open - whether Court has power to make retrospective order for joinder - whether "just" in the circumstances to make the order - relevant considerations

The Corporations Law (C'th), ss574(3), (4) and (5)
Supreme Court (Companies) Rules (NT), r7
Supreme Court (Corporations Law) Interim Rules (NT), r4
Supreme Court Rules (NT), Rules 1.09, 59.02(1) and (2)

Tyman's Ltd v Craven [1952] 1 All E.R. 613, followed
Morris v Harris [1927] AC 252 (HL), distinguished
Re Pollnow (1994) 12 ACLC 88, followed
McAusland v DFC of T (1994) 12 ACLC 78 (French J), followed
Re Donald Kenyon Ltd [1956] 1 WLR 1397, followed

PRACTICE AND PROCEDURE - joinder of parties - application under Rules of Court to join a defendant retrospectively - whether Court should refuse joinder where Limitation defence available, as a rule of practice - basis of rule of practice - whether Court has power under the Rules to join a party retrospectively

Limitation Act (NT), s48A
Supreme Court (Rules of Procedure) Act (NT), s20
Supreme Court Rules (NT), Rules 1.10(1), 2.04, 9.06(b), 9.11(3)(a) and 36.06

Phillip Morris Ltd v Bridge Shipping Pty Ltd, [1994] 2 V.R. 1, followed
Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 103 ALR 607, applied
Smart v Stuart (1992) 83 NTR 1, followed

PRACTICE AND PROCEDURE - order by Court of Appeal removing deregistered defendant\company from record - company later re-registered - whether Supreme Court may retrospectively join company as defendant

REPRESENTATION:

Counsel:

Applicant:	S. Southwood
First and Second Respondents:	N. Henwood
Third Party:	No appearance

Solicitors:

Applicant:	Ward Keller
First and Second Respondent:	Cridlands
Third Party:	Barr Moore & Co.

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 111 of 1989

BETWEEN:

YAMAMORI (HONG KONG) LIMITED
Applicant/Plaintiff

AND:

GEOFFREY ROBERT CLARK and
MICHAEL JAMES GILLOOLY
First
Respondents/Defendants

AND:

CTG PTY LTD
Second Respondent

AND:

DATUK BIN MOHD. SALLEH
Third Party

CORAM: KEARNEY J

RULING ON APPLICATION OF 24 AUGUST 1994

(Delivered 14 December 1994)

The application

By applications of 5 and 24 August 1994 Yamamori (Hong Kong) Ltd (hereinafter "the plaintiff") in essence seeks the same relief, namely that CTG Pty Limited (herein "CTG") be joined as a defendant in this action, the joinder to be effective as from the date of the issue of the writ herein, 24 February 1989.

The applications were argued before me on 25 August 1994. By consent, the application of 5 August 1994, which was made in proceedings No.27A of 1993 (see p6), was adjourned sine die; I rule today on the application of 24 August 1994 (Doc. 93) in these proceedings. The application should have been intituled as set out on p1.

The Third Party to this action, Datuk Bin Mohd. Salleh, was not represented at the hearing of this application. I was not informed as to whether he had been served with the Summons of 24 August. However, during the hearing, I ordered that a transcript be sent to Mr Moore of Messrs Barr, Moore & Co, his solicitors, to provide an opportunity to make submissions on any matters raised in the application. To that end I delayed ruling, to afford Mr Moore that opportunity; I was informed on 13 September 1994 that the Third Party did not wish to make any submissions.

The background to the application of 24 August 1994

Proceedings No.111 of 1989 were instituted by Writ on 24 February 1989. The plaintiff sued CTG as first defendant. CTG was a company created under legislation providing for the incorporation of legal practices; it practised as a firm of solicitors in Darwin under the name of 'Clark & Partners'. The plaintiff also sued as second defendants Messrs Clark and Gillooly, directors of CTG and thereby persons deemed by s8 of the Legal Practitioners (Incorporation) Act jointly and severally to guarantee the debts of CTG. The plaintiff claimed that CTG after 17 October 1984 acted in breach of trust in the way it had dealt with a

sum of $2million it allegedly held on trust for the plaintiff, or had been negligent in its management of that fund in breach of a duty of care it owed to the plaintiff in that respect; and as a consequence the plaintiff had suffered loss and damage. See generally the claim set out in the Endorsement/Statement of Claim on the Amended Writ of 16 September 1992 (Doc.72)

It will be noted that the actions complained of were in October 1984 and the writ issued over 4 years later, early in 1989. By Summons dated 13 August 1991 (Doc.45), inter alia, certain Limitation Act defences were sought to be relied on by CTG (then the first defendant) and by Messrs Clark and Gillooly (then the first and third named second defendants) by way of further amendments to their respective amended Defences. CTG also sought an order that it recover judgment against the plaintiff, on the basis that the plaintiff's claim was time-barred under the Limitation Act when it issued its writ. Leave to amend the Defences was unopposed, and granted. By Summons dated 14 November 1991 (Doc.48), the plaintiff sought, in response, to amend its Writ so as to include a request for an extension of time pursuant to s44(1) of the Limitation Act; it also sought an order extending the 3-year limitation periods prescribed by s12(1) of the Act to 24 February 1989, the date it had issued its writ.

Angel J heard these two applications together and ruled on 11 September 1992 (Doc.71), for reasons then stated (Doc.69):

"1. The Plaintiff have leave to amend the Writ filed 24 February 1989 by adding the following endorsement:

"The Plaintiff seeks an extension of time pursuant to s44 of the Limitation Act."

2. The limitation period prescribed by s12 of the Limitation Act for an action founded on tort be extended until 24 February 1989.

3. The limitation period prescribed by s13 of the Limitation Act for an action for account be extended until 24 February 1989.

4. The limitation period prescribed by s33 of the Limitation Act for an action in respect of a breach of trust be extended until 24 February 1989.

5. The application by the First Defendant and the first and third named Second Defendants for judgment in accordance with paragraph 3 of the Summons filed 13 August 1991, be dismissed."

His Honour was not informed at the hearing of these applications in April 1992, or prior to delivering his decision on 11 September 1992, of the fact that CTG had been deregistered under s574(1) of The Corporations Law (herein "the Law") on 27 February 1992. The effect of the deregistration was that CTG was thereafter dissolved; that is, it had ceased to exist. I was informed on 25 August by Mr Southwood of counsel for the plaintiff that the plaintiff was not aware of that fact on 11 September 1992, or prior thereto.

On 9 October 1992 CTG and Messrs Clark and Gillooly filed an application for leave to appeal from orders 1-4 in Angel J's decision of 11 September 1992; see p4 and document 73A. The application was heard on 9 December 1992 by the Court of Appeal. Leave to appeal was refused: see *CTG Pty Ltd v Yamamori (Hong Kong) Ltd* (1992) 10 ACSR 534.

Accordingly, it might seem that all the orders made by Angel J on 11 September 1992 (see p4) remained in force. However, during the hearing on 9 December 1992 the fact that CTG had been deregistered for over 9 months came to the attention of the Court of Appeal. Although none of the parties sought any relief in that respect the Court of Appeal in its judgment alluded to the deregistration and ex mero motu ordered that the then First Defendant CTG be formally removed as a party to this action to "rectify the record". The Court said at pp535-6:-

> "- - - when the application [for summary judgment] was heard and determined [by Angel J] on 11 September 1992 CTG Pty Ltd did not exist. Notwithstanding that impediment, senior counsel for the applicants [CTG and Messrs Clark and Gillooly] informed the Court that CTG Pty Ltd proposed to apply pursuant to s574 of the Corporations Law for the registration of the company to be reinstated and submitted that the appropriate course in all the circumstances was to determine the applications for leave to appeal on the basis that CTG Pty Ltd was notionally a party with standing. Surprisingly, counsel for the respondent to the application for leave to appeal [the plaintiff] supported that submission. The relevant documents evidencing the deregistration of CTG Pty Ltd pursuant to s574 of the Corporations Law were tendered in evidence by consent.
>
> That CTG Pty Ltd had been deregistered and hence gone out of existence was not revealed to Angel J. If it had been, we are in no doubt that his Honour would not have permitted a litigant with no standing to pursue an application for summary judgment against the plaintiff and to resist the plaintiff's

application for leave to amend as set out above. Indeed, nor would his Honour have entertained an application by that party to amend its defence, which his Honour granted leave to do in the absence of any opposition. The orders that the primary Judge made concerning CTG Pty Ltd were clearly made per incuriam and this Court must now rectify the record. These matters having been raised with senior counsel for the applicants, an amended application for leave to appeal was substituted by consent confining the application to one made by the second defendants, Geoffrey Robert Clark and Michael James Gillooly.

It is appropriate, therefore, to order that the order [by Angel J on 11 September 1992] granting leave to CTG Pty Ltd to amend its defence be set aside on the ground that CTG Pty Ltd was not competent to make the application for leave to amend the defence, and further to order that CTG Pty Ltd be removed as a party to the proceedings as from 27 February 1992. We order accordingly.

The rights of CTG Pty Limited to make application either to the Australian Securities Commission or to the Court for the reinstatement of the registration of the company are not affected by the orders we have made." (emphasis mine)

Some 2 months later, by Summons dated 16 February 1993 Messrs Clark and Gillooly instituted proceedings 27A of 1993, applying ex parte under s574(3) of the Law and r12(2) of the Supreme Court (Companies) Rules for the registration of CTG to be reinstated. On 18 February 1993 Master LeFevre granted the relief sought; see his order at Annexure "A" to the affidavit of Mr Alderman of 24 August 1994 (Doc.94) in these proceedings. I was informed by Mr Southwood that the plaintiff had no notice of the making of the application of 16 February 1993; this was not controverted by the defendants, and I accept it as fact, for the purposes of the present application. Mr Southwood contended that if the plaintiff had been aware of that application it would have appeared before the Master on 18 February 1993 and sought, and obtained, the relief it now seeks (p1).

The plaintiff's submissions

Mr Southwood relied on two submissions: one was founded on s574 of the Law and r59.02(1) & (2) of the *Supreme Court Rules* (herein 'the Rules'), the other on Rules 1.10, 2.04, 9.06 and 9.11 of the Rules.

(a) The first submission

Mr Southwood submitted that ss574(3), (4) and (5) of the Law, read with r59.02(1) and (2) of the Rules, authorized making the order sought (p1); it would in effect be an order made nunc pro tunc, amending the Master's order of 18 February 1993 (see Doc.94), in light of s574(5) of the Law (p11).

In support, Mr Southwood relied on *Tyman's Ltd v Craven* [1952] 1 All E.R. 613, the affidavit of Mr Stewart of 5 August 1994 filed in proceedings 27A of 1993, and the affidavit of Mr Alderman of 24 August 1994 (Doc.94). He sought to distinguish *Morris v Harris* [1927] AC 252 (HL).

(b) The second submission

Mr Southwood submitted that Rules 1.10, 2.04, 9.06 and 9.11 of the Rules independently authorized making the order sought in the application of 24 August (Doc.93). He submitted that as "all the causes of action against all defendants are interwoven" and the "greater justice" of the application lay with the plaintiff, the order sought (p1) should be made.

In support, he relied on *Australia and New Zealand Banking Group v Larcos* (1987) 13 NSWLR 286, *Liptons Cash Registers and Business Equipment Ltd v Hugin (GB) Ltd* (1982) 1

All ER 595, and *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The "Katowice 11")* (1990) 25 NSWLR 568; on part of what appears in par19.06.20 of Williams, 'Civil Procedure, Victoria'; and on the affidavits of Messrs Stewart and Alderman of 5 and 24 August respectively. He sought to distinguish *Weldon v Neal* (1887) 19 QBD 394 and the authorities in which the Rule there formulated was applied.

Mr Southwood further submitted that if the relief sought at p1 were not granted, this Court should simply dismiss the application of 24 August, thereby enabling the plaintiff to appeal to the Court of Appeal for relief along the lines now sought.

The defendants' submissions

As to the plaintiff's first submission (p7), Mr Henwood of counsel for the defendants and for the second respondent CTG, submitted that the order by the Court of Appeal of 9 December 1992 (p6) prevented this Court from exercising its discretionary power under s574(3)-(5) of the Law to grant the relief sought. He submitted that the plaintiff's proper course was to apply to the Court of Appeal to set aside its order (p6) of 9 December 1992.

As to the plaintiff's second submission (p7-8), Mr Henwood submitted that the authorities relied upon by the plaintiff do not support the proposition that this Court can make an order under r9.06(b) of the Rules (p21-22), with retrospective effect. He submitted that the authorities distinguish in this respect between the joinder of causes of

action and the joinder of parties: while new causes of action may be joined retrospectively, r9.11(3)(a) - see p22 - specifies that on joinder of a new defendant the action commences against him only from the date on which the writ is amended as required by r9.11(1), to take account of the order joining him; that is, his joinder takes effect only prospectively. Consequently, he submitted, the authorities relied on by the plaintiff (see p8), and its attempt to distinguish *Weldon v Neal* (supra), were "not particularly germane because of [the above] distinction". In support, Mr Henwood relied on *Phillip Morris Ltd v Bridge Shipping Pty Ltd,* now reported at [1994] 2 V.R. 1, *Fernance v Nominal Defendant* (1989) 17 NSWLR 719 and *Drinan v Hickey* (1982) 11 NSWLR 744; and on part of what is stated in par19.06.20 of Williams, op.cit.

Mr Henwood conceded that pursuant to r9.06(b) - see p21-22 - the Court could order that CTG be now joined as a defendant. In his submission that joinder would operate prospectively, from the date specified by r9.11(3)(a). He submitted that the result would be that the defendants would retain the practical benefit of the Limitation Act defences, which they had acquired as a result of the Court of Appeal's order of 9 December 1992 (p6) removing CTG from the action. He stated that CTG and Messrs Clark and Gillooly agreed to an order "dispensing with the requirement to file and serve [the] amended documentation" required under r9.11(1), so that the trial of the action could be expedited.

The plaintiff's submissions, in reply

Mr Southwood sought to distinguish the authorities (p9) on which the defendants relied, on the basis that they involved the application of the rule in *Weldon v Neal* (supra), which was irrelevant here.

He submitted that the relief sought in the application of 24 August (p1) did not involve the defeating of a Limitation Act defence "ab initio" as in *Weldon v Neal* (supra); rather, that order if made would enable the plaintiff to have the benefit of the order of Angel J of 11 September 1992 (p4) "which was validly obtained". He submitted that this outcome would accord with the "greater justice" of the case.

Conclusions

(a) The application based on s574 of the Law

I turn to the plaintiff's first submission (p7).

Section 574 of the Law, as far as relevant, provides:-

> "(3) If a person is aggrieved by the cancellation of the registration of a company, the Court, on an application made by the person - - - may, if satisfied that the company was, at the time of the cancellation, carrying on business or in operation or otherwise satisfied that it is just that the registration of the company be reinstated, order the reinstatement of the registration of the company.
>
> (4) On the lodging of an office copy of an order under subjection (3), the company shall be deemed to have continued in existence as if its registration had not been cancelled.
>
> (5) The Court may, in an order under subsection (3), give such directions and make such provisions - - - as seem just for placing the company and all persons in the same position, so far as possible, as if the company's

registration had not been cancelled" (emphasis mine)

For the purposes of s574(4), it is common ground that an office copy of Master LeFevre's order of 18 February 1993 has been duly lodged. Accordingly, CTG is required by s574(4) to be treated as having "continued in existence as if its registration had not been cancelled" on 27 February 1992.

It is clear that, pursuant to r7 of the Supreme Court (Companies) Rules and r4 of the Supreme Court (Corporations Law) Interim Rules, the Rules apply to this application. Rules 59.02(1) and (2) provide as follows:-

> "(1) A judgment given or order made by the Court shall bear the date of and take effect on and from the day it is given or made, unless the Court otherwise orders.
>
> (2) Any other judgment shall bear the date of and shall take effect on and from the day it is authenticated in accordance with Order 60." (emphasis mine)

Rule 1.09(1) defines "judgment given" as "a judgment given by the Court - - - on the hearing of an application in a proceeding."

Mr Southwood's submission was that s574(3)-(5) of the Law should be interpreted broadly and, read with the power under r59.02(1) to order 'otherwise' as to the date of effect of a Court order, authorized the making of the retrospective order sought at p1, even though the directions now sought under s574(5) had not been made by the Master on 18 February 1993, when ruling (p6) on the ex parte application to re-register CTG.

In *Tyman's Ltd v Craven* (supra) the Court of Appeal had to consider the effect of s353(6) of the Companies Act 1948 (UK), which is similar in wording and substance to

s574(4)-(5) of the Law. The point at issue was the construction of the 'deeming' phrase in s353(6), similar in wording to s574(4) of the Law (p10), viz:-

> "- - - the company shall be deemed to have continued in existence as if its name had not been struck off; - - -"

The respondent had submitted that the words which immediately followed this phrase, similar to the wording of s574(5) of the Law (p11), viz:-

> "- - - and the Court may by the order [restoring the name of the company to the register] give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off"

substantially qualified the 'deeming' phrase, and meant it did:

> "no more than preserve the continuance of the company's corporate existence, without validating ex post facto any acts done in the company's name during the period of its temporary dissolution".

The trial Judge had accepted that proposition, relying on what Lord Blanesburgh said in *Morris v Harris* (supra) at pp268-9. In the Court of Appeal, Sir Raymond Evershed MR considered that *Morris v Harris* (supra) should be distinguished, on the basis that the legislative provisions construed in the two cases "[differed] in form and language", a difference which his Lordship considered at p616 to be -

> " - - - of the highest importance, and it is derived, at least in part, from the fact that the two subsections are dealing with different and distinct sets of circumstances."

His Lordship proceeded to consider those circumstances at p618, and concluded:-

> "In my judgment, the wording of s353(6) is not apt to achieve the same result as that which flows from the language of s352(1)."

Section 352(1) was the equivalent in the Companies Act 1948 to s223(1) of the Companies (Consolidation) Act 1908, the provision considered in *Morris v Harris* (supra). His Lordship continued:-

> p618 "The final sentence of the former [s353(6)], following the semi-colon, cannot, as I think, properly be regarded as "expository" of that which precedes, as is the case with the final sentence of s352(1), which, by the introductory "and thereupon", denotes the consequences which, on the making of the order of restoration, flow from that fact, viz., that from the date of the order (but not before)
>
> > "such proceedings may be taken as might have been taken if the company had not been dissolved."
>
> Section 353(6) contains no statement at all of any such consequences; the final sentence confers a special power to add where necessary to the order of restoration special directions designed to achieve something wholly different, viz., a putting back of the clock, an achieving of what Lord Sumner called an "as you were position" between the company and
> p619 third parties. - - - some sensible content must be given to the final words of [s353(6)], and this problem at first seemed to me to create a difficulty in the company's way. Without, however, attempting to define the scope of the words exhaustively, counsel for the company was able to give instances in answer to the question put to him. During the period of the company's suspended animation, the company, as well as third parties, might well have abstained from taking those steps - a step in an action, or the exercise of some contractual right - for which the proper time might have in the meantime expired. In my judgment, the final words of the sub-section can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened.
>
> More generally the final words of the subsection seem to me designed not, by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the Court (consistently with justice) to achieve to the fullest extent the 'as-you-were position' which, according to the ordinary sense of those general words, is prima facie their consequence." (emphasis mine)

On that basis his Lordship distinguished *Morris v Harris* (supra). Hodson LJ agreed with the Master of the Rolls, and said at p628:-

> "- - - [I] think that the latter part of [s353(6)] is complementary [to the earlier part] and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost. - - - That the last four lines of the sub-section do not cut down the retro-active effect of that which precedes them is, to my mind, indicated by the introductory words "and the court may by the order". The directions and provisions to be made by the order would naturally be supposed to make good what had previously been stated, viz., that the company should be deemed to have continued in existence as if the name had not been struck off." (emphasis mine)

Their Lordships accordingly held that it was not open to the landlord to object that no application had been made on behalf of the now re-registered company for a new tenancy at the earlier date, merely because it was at that date de-registered.

I respectfully agree with their Lordships' analysis and approach and, given the striking similarity in wording and substance between s574(4)-(5) of the Law and s353(6) of the Companies Act 1948 (UK), I apply that analysis and approach to the present case. Accordingly, I accept Mr Southwood's submission that while the different legislative provision in *Morris v Harris* (supra) necessarily speaks of an order with prospective effect, the provision considered in *Tyman's Ltd v Craven* (supra) (p12), similar in effect to s574(5) of the Law (p11), speaks with retrospective effect; it allows "a putting back of the clock" as the Master of the Rolls put it in that case at p618, "where justice [so] requires" (pp13-14).

I also accept Mr Southwood's submission (p11) that s574(3)-(5) of the law should be interpreted broadly; however, the objective always is to make an order which is "just", in all the circumstances. This approach and objective is illustrated by Burchett J in *Re Pollnow* (1994) 12 ACLC 88 at p94. In that case his Honour had to decide whether an order should be made pursuant to s574(3) of the Law to reinstate the registration of 2 companies, in whose names (amongst others) a bankruptcy notice had issued at a time when they were in fact dissolved under s574(1).

His Honour considered the question of what was "just" at pp93-95 of the report. He observed at p93:-

> "There is a very large question whether, if reinstatement would have [a retrospective effect so as to validate all actions taken purportedly on behalf of each of the companies, in connection with the issue and service of the bankruptcy notice], it would be just in all the circumstances of this case to make such an order [for reinstatement]."

He distinguished the actual decision in *Tyman's Ltd v Craven* (supra) (p14), on the facts; there the company had continued to trade, and the persons who had acted as its directors would, if it had not been dissolved, have then been in office as its directors and acting within their authority in applying for the new tenancy. In contrast, in *Re Pollnow* (supra), neither company was carrying on business when its registration was cancelled, and it was not shown that the directors who purportedly acted on behalf of the companies in issuing the bankruptcy notice, remained validly in office at that time. It was probable that they could not be said to have acted validly at that time in issuing the bankruptcy notice even if the companies were treated as having then been in existence.

His Honour considered, however, that an order simpliciter under s574(3), would not reverse "any consequence of the effluxion of time or [have] the effect of putting back into office a director whose term of office [had] expired", citing French J in *McAusland v DFC of T* (1994) 12 ACLC 78 at p86.

In *McAusland v DFC of T* (supra) one P had been the sole director of the company when the Court ordered it to be wound up in 1978. A liquidator was appointed. In 1987, the Court ordered that the winding up be terminated on 1 December 1987, the day following a meeting it directed to be held to elect new directors. No such meeting was held. In 1993 P purported to authorize the appointment of an additional director K, and the board so constituted authorized Mr McAusland to conduct certain Court proceedings. Whitlam J held that P's office as director was vacated in 1987, due to failure to comply with the terms of the 1987 Court order; accordingly, there were no directors in office who could have authorized Mr McAusland. In the Full Court Gummow J assumed (p80) for the purposes of the appeal that the 1978 winding up order "did not have the effect of discharging [P] from his office as director", citing the discussion of authorities by Cohen J in *Land Corporation Pty Ltd v Green* (1991) 22 NSWLR 532 at pp542-3; he noted that nevertheless "during the currency of the winding up [P] was - - - unable to exercise" his powers as director. Gummow J, with whom Sheppard J concurred on this point, agreed with Whitlam J's view of the 1987 order.

French J construed the 1987 order differently: he did not consider it was a condition of the order for

termination that an election be held; there was simply a procedural direction to that effect. It was therefore necessary for his Honour to consider whether P was restored by the termination order of 1987 to his former powers as director; this necessitated consideration of whether the winding-up order of 1978 had vacated his office or merely suspended his powers. His Honour reviewed the "conflicting authorities and opinions" on this question, concluded that the "suspension of powers approach" was preferable to that of "automatic vacation", and observed at p86:-

> "The suspension of the directors' powers does not cause time to stop running so far as the continuance of their terms is concerned. If, while a winding up order is in effect, a director's term of office comes to its end by force of the Articles of the company, there is nothing about the winding up process or the relevant statutory provisions which would prevent that event. So it may happen that prior to a termination order, all offices may have been vacated by effluxion of time."

French J concluded at p87:-

> "[P] did not cease to be a director on 30 November 1987. He continued as a director thereafter and was able to act pursuant to Regulation 84 to create a quorum by appointing [K] as a director. It follows, in my respectful opinion, that his Honour was in error in taking the view that he did that [P] ceased to be a director of the company on 30 November 1987 and that there were no directors thereafter. For those reasons, in my opinion, the appeal against his Honour's decision on the motion challenging the retainer of Mr McAusland should be allowed."

I respectfully agree with the views of French J at p86 (p17); I return to *Re Pollnow* (supra).

I respectfully agree with Burchett J's view as to the effect of an order simpliciter under s574(3), at p16. His Honour went on (at p94) to say that s574(5) enabled the Court to make an order or give directions to remedy these consequences, subject to what was "just" in the circumstances.

In considering whether the Court should exercise the power under s574(5) his Honour, said at p95:-

> "In my opinion, it is clear that the Court should have regard to the consequences for other persons of the retrospective effects which the statute gives to an order of reinstatement". (emphasis mine)

Burchett J went on to consider the circumstances in the case before him, in particular that if the actions of those who caused the notice to issue were now "made good", the result would be "to foist upon Mr Pollnow a bankruptcy notice which will still be beset by a cluster of problems". This was because there would remain an inconsistency between the order for reinstatement and the judgment; and retroactive validation of the bankruptcy notice could "well be futile, and would very likely involve the parties in costly appeals", since it was probable that at the relevant time there were no directors entitled to issue the bankruptcy notice.

His Honour accordingly ordered reinstatement of the companies, without retrospectively validating the issue of the bankruptcy notice.

In *Re Donald Kenyon Ltd* [1956] 1 WLR 1397 Roxburgh J also considered that on an application for reinstatement, the Court should have regard to the consequences for other persons. The headnote reads:-

> "A petition for the restoration to the register, of a company which had not traded since 1940 and had been struck off in 1949, pursuant to section 353(6) of the Companies Act, 1948, and for its subsequent winding-up contained a statement: "It is apprehended that all the debts of the company at the time of its dissolution have since become statute barred":-
>
> > HELD, that there should be inserted in the order for restoration to the register a proviso that in the case of creditors who were not

> statute barred at the date of the dissolution, the period between that date and the restoration of the company to the register should not be counted for the purposes of any Statute of Limitations."

His Lordship noted at p1401:-

> "Moreover, what I have to do is put all other persons - not only the company, but all other persons - in the same position as nearly as may be as if the name of the company had not been struck off". (emphasis mine)

I respectfully agree with the approaches of Burchett and Roxburgh JJ and adopt them in this present case.

There is, however, the matter of the Court of Appeal's extant order of 9 December 1992 (p6), removing CTG from the proceedings. Mr Southwood submitted that -

> "the effect of [the Master's order of 18 February 1993 in light of] the relation - back provision is that both Angel J's order of 11 September 1992 and the Court of Appeal's order of 9 December 1992 would appear to be valid orders" (emphasis mine)

He submitted that this Court should "make an order, in effect nunc pro tunc [upon the Master's order of 18 February 1993], pursuant to ss(5) of s574". Does the existence of Court of Appeal's order of 9 December 1992 (p6) that "CTG Pty Ltd be removed as a party to the proceedings", prevent this Court from exercising its discretion pursuant to s574(5) to grant the relief now sought, that is, the retroactive joinder of CTG as defendant in the proceedings? That order of 9 December 1992 was intended to clear away from the action a non-entity then wrongly named as a party on the record. In historical time, as at 9 December 1992 CTG did not exist; it had ceased to be a living entity on 27 February 1992. By the combined effect of the Master's order of 18 February 1993 and s574(4) of the Law, CTG is now to be "deemed to have continued in

existence as if its registration had not been cancelled [on 27 February 1992]". It is not now re-born; the legislature has said, by statutory fiction, it must now be treated as having never died. The whole basis of the Court of Appeal's interlocutory order of 9 December 1992 (p6) has, retroactively, disappeared. Nevertheless, the order of 9 December 1992 stands; the Cheshire cat has gone, but its smile remains. It is arguable that if an order for the retroactive joinder of CTG as a defendant is now made as sought (p1), it would contradict the order of the Court of Appeal; to do so would be both improper and ineffective.

However, it will be noted that the Court of Appeal expressly stated (p6) that its order of 9 December 1992 did not affect "the rights of CTG Pty Limited to make application - - - for reinstatement of [its] registration." It would appear to be a corollary that the Court did not intend its order to stand in the way of any directions given under s574(5) of the Law, if its registration were reinstated under s574(3).

On the whole, I think that is the better construction, and I do not consider that the Court of Appeal order of 9 December 1992 prevents this Court from now making a retroactive order under s574(5) of the Law.

The first submission (p7) succeeds. Before considering whether the order sought should be made, lest I am wrong on this aspect of the submissions, I turn to the plaintiff's second submission (pp7-8). This is to be considered quite independently of the first submission (p7).

(b) The application based on the Rules

The relevant Rules are as follows. Rule 1.10(1) provides, as far as material:-

> "In exercising a power under this Chapter the Court -
>
> - - -
>
> (b) may give any direction or impose any term or condition it thinks fit."

Rule 2.04 provides:-

> "The Court may dispense with compliance with a requirement of this Chapter, either before or after the occasion for compliance arises."

Rule 9.06 provides, as far as relevant:-

> "At any stage of a proceeding the Court may order that -
>
> - - -
>
> (b) any of the following persons be added as a party:
>
> (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated on; or
>
> (ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding; or
>
> - - -." (emphasis mine)

Rule 9.11 provides, as far as relevant:-

> "(1) Where an order is made under rule 9.06 - - - the writ - - - filed in the Court shall be amended accordingly within the time specified in the order or, where no time is specified, within 14 days after the making of the order, and a reference to the order, the date of the

order and the date on which the amendment is made shall be endorsed on the originating process.

(2) The filing of a copy of the originating process amended and endorsed as required by subrule (1) is a sufficient compliance with that subrule.

(3) Where an order is made under rule 9.06 - - - adding - - - a person as defendant -

(a) the proceeding against the new defendant commences on the amendment of the filed originating process in accordance with subrule (1) or (2);

- - -." (emphasis mine)

Mr Southwood submitted that Rules 1.10(1)(b) and 2.04 empowered this Court to order, notwithstanding Rule 9.11(3)(a), that CTG be joined as a defendant to these proceedings with retroactive effect from the date of issue of the writ on 24 February 1989. In support he relied on the cases cited at p8, and sought to distinguish the authorities relied on by Mr Henwood (at p9); their respective submissions are at pp7-8, and 8-9.

I have read the authorities cited by the parties. Three of them, I think, resolve the question in issue: *Phillip Morris Ltd v Bridge Shipping Pty Ltd,* (supra), 2.

In *Smart v Stuart* (supra) Mildren J said, obiter, at p10:-

" - - - the "Rule in *Weldon v Neal*" (1887) QBD 394, is concerned with the rule of practice that an amendment to a proceeding would not be permitted to set up a cause of action, which, if a writ were to be issued in respect thereof at the date of the amendment, would then be barred by the Statute of Limitations. This is a similar rule to that upon which the earlier decisions to which I have referred rested, namely, that that substitution or addition of a new party would not be permitted so as to defeat a defence based on the Statute of Limitations. As Dawson J pointed out in *Bridge*

> *Shipping Pty Ltd v Grand Shipping SA* (1991) 103 ALR 607; 55 ALJR 76 at 77, the accepted theory at one time was that the substitution or addition of a party by amendment related back to the commencement of the proceedings. That is not the present view, and O.9.11(3)(a) of the Supreme Court Rules expressly provides that where an order is made under O.9.06 adding or substituting a person as defendant, the proceeding against the new defendant commences on the date of the filing of the amended originating process. Oddly, O.9 makes no reference to the position where a party is substituted as a plaintiff. But it was not contended that the power to make the order rested on O.9, and it is unnecessary to consider that rule further." (emphasis mine)

This analysis is supported by Ashley J in *Phillip Morris Ltd v Bridge Shipping Pty Ltd* (supra). The facts of that case are rather complex. For present purposes Bridge, a freight-forwarder, issued bills of lading to Morris for goods it forwarded to Morris by the ship "Green Sand". Some of these goods were lost or damaged en route. Morris sued Bridge for breach of contract. Morris sought to join as defendant Tokumaru Kain Co. Ltd, the ship operator, alleging negligence. The limitation period for the negligence claim expired by 2 June 1992. On 5 June 1992 the Master ordered the joinder of Tokumaru, and that the joinder be deemed to have occurred on 28 May 1992. Tokumaru was thereby deprived of a Limitation Act defence.

Various applications came before Ashley J to set aside the Master's order of 5 June 1992. Whether Tokumaru had been properly joined involved various questions: whether joinder should be refused at a time when a cause of action was statute-barred; whether the Master had power to backdate the joinder to 28 May 1992; and whether Morris should be granted extensions of time to amend its writ, under r9.11(1).

In considering whether the Master's order was valid, Ashley J said at pp7-9 and 11-14:

> "7. While a Limitation defence is a right available to a defendant, to exercise or not as it sees fit, there is high authority that joinder of a party ought be refused where the cause of action alleged against that person would be statute barred. In Ketteman & Ors. v. Hansel Pty Ltd & Ors [1987] 1 AC 189, Lord Keith of Kinkel said, at pp199-200:
>
> > "It has long been a rule of practice that amendment should not be allowed for the joinder of an additional defendant in a situation where a relevant period of limitation has already expired in relation to the cause of action against him."
>
> 8. His Lordship then discussed the reason for that rule of practice. Two explanations were available. One was that, when joinder was effected, the party joined became a party as from the date of issue [of] the writ; that depriving such party of a valid defence otherwise available. The second possible explanation was that the party joined did not become a party until joinder; at that time joinder would be futile, the party to be joined having an unanswerable defence. His Lordship considered that the second of these explanations was correct.
>
> When, as Bridge Shipping Pty Ltd v. Grand Shipping S.A. & Anor (1991) 173 CLR 231, the voyage of the "Green Sand" made its way to the High Court, perhaps not for the last occasion, Dawson J. said this, at pp235-236:
>
> > "Were it not for the expiry of the limitation period, Bridge Shipping could have applied under r.9.06 of Ch. I of the Rules of the Supreme Court of Victoria for the substitution of Rainbow Line for Grand Shipping as a third party. That rule provides for the substitution of a person who ought to have been joined as a party for a person who is not a proper or necessary party. But under r.9.11(3)(a) the proceeding against Rainbow Line would have been deemed to have been commenced at the time of amendment of the filed originating process and a defence would have been available to Rainbow Line under the Hague Rules. In those circumstances, any application for the substitution of Rainbow Line for Grand Shipping is likely

> to have been refused because it would have been futile in the light of the defence available to Rainbow Line.
>
> I have put the matter that way because that is how I understand the position now to be. At one time it was thought that the substitution or addition of a defendant by amendment related back to the commencement of the proceedings so that, if the proceeding were commenced before the expiry of the limitation period, the amendment would defeat the limitation period even though the amendment was made after the expiry of that period. Upon that view, the reason for not allowing the amendment was that it would deprive the defendant substituted or added of the benefit of the limitation period: see *Mabro v Eagle, Star and British Dominions Insurance Co. Ltd.* [1932] 1 K.B. 485; cf. *Davies v Elsby Bros. Ltd.* [1961] 1 W.L.R. 170. The accepted view now is - particularly having regard to the present form of the relevant rule (r.9.11(3)) - that the substitution or addition of a defendant by amendment does not relate back to the commencement of proceedings but takes effect from the time of the amendment. That means that the amendment cannot prejudice any existing rights under a statute of limitations (or any other limitation period). Accordingly, leave to amend to substitute or add a defendant who has a good defence under a period of limitation will generally be refused as serving no useful purpose: *Liff v Peasley* [1980] 1 W.L.R. 781: *Ketteman v Hansel Properties Ltd.* (supra)."

It appears that his Honour accepted the rationale preferred by Lord Keith of Kinkel in Ketteman. But it is to be observed that his Honour did not say that refusal of joinder was obligatory, but rather that it was "likely to have been refused" or "will generally be refused". Mr Strahan contended that this reservation was intended to accommodate the situation where a limitation defence was not certain to succeed. He submitted that in some cases, for example, it might require detailed evidence at trial to determine just when a cause of action had become complete. It may be, despite his reference to 'a defendant who has a good defence under a period of

9. limitation', that his Honour had in mind a situation such as mentioned by Mr Strahan; or

perhaps there was in contemplation a situation where a prospective defendant had informally indicated an intention not to take a limitation defence otherwise available. But whatever circumstance his Honour had in mind, it is certainly clear, and counsel for the plaintiff and Bridge did not submit to the contrary, that there is a rule of practice of general application that an order for joinder of a party against whom a cause of action would be statute barred will not be made. That rule has been applied by Courts both in Australia and England over a protracted period; see, e.g.: Drinan v. Hickey (1987) 11 NSWLR 744, Stout v. R.A. Wenham Builders Pty Ltd[1980] 1 NSWLR 426; compare Archie v Archie [1980] Qd R 546 and Adam v Shiavon [1985] 1 Qd R 1, at p7.

Of course, if a person be added as a defendant, that would not of itself deprive such person of an ability to take a limitation defence.

- - -

There is a distinction between an order which adds (or, colloquially, joins) a party and the date upon which a proceeding against a new defendant commences. Where an order is made under Rule 9.06, Rule 9.11(1),(2) makes provision for amendment of the writ or other originating process filed in court. Rule 9.11(3)(a) provides that:

> "the proceeding against a new defendant commences upon the amendment of the filed originating process in accordance with paragraph (1) or (2); - - -"

- - -

11. It is convenient at this point to consider the submissions for the plaintiff and Bridge in respect of the limitation argument. - - -

Neither of counsel for the plaintiff or Bridge contended that there was not a general rule of practice that an order for joinder will not be made where a period of limitation has already expired.

It was submitted, however, that:

* the rule of practice is, being a rule of practice only, not immutable;

* it was within the Master's power to order that proceedings be deemed to have been commenced at an earlier time so as:

- to overcome the operation of r9.11(3);
- to preclude a limitation defence that would otherwise have been available.

* a proper exercise of discretion would be one favourable to the plaintiff and Bridge, in all the circumstances.

The first of these propositions may be accepted. As to the second, counsel for the plaintiff and Bridge relied upon the Court's power under r1.14(1)(b) [in the same terms as r1.10(1)(b) of the Supreme Court Rules (NT)] to

12. justify making an order both overcoming the effect of r9.11(3) and backdating commencement of proceedings so as to result in their being commenced within time. I was also referred to r59.02(1), to various cases dealing with the application of that rule, to Australia & New Zealand Banking Group Ltd v Larcos (1987) 13 NSWLR 286, to Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (1990) 25 NSWLR 568, and to certain passages of the judgment of Lawton, LJ., in Ketteman.

Counsel conceded that r59.02(1) did not authorize the Master's order of 5 June 1992. It provides that the Court may order that a judgement or order shall take effect from a day other than the date it is given. Operation of the Rule could bring about a judgement or order taking effect from a day other than the date it is given. Its operation could not affect the present case, where the key question was not the date upon which the order took effect, but the date of commencement of proceedings. The most that can be said is that the Rule specifically recognizes that court orders will not inevitably operate only prospectively.

Larcos was not a case about the joinder of parties. A defendant cross-claimant sought to amend his cross claim to include reliance on s52 of the Trade Practices Act. The application was made outside the limitation period fixed by that Act. When the cross claim was originally made the Supreme Court of New South Wales did not have jurisdiction in respect of claims under the Act. In essential respects the proposed amendment was based upon the same facts as the existing crossclaim. Amendment was permitted to operate from a date after jurisdiction was conferred on the Court. The ordinary effect of permitted amendment would have been that it operated from the date of the original crossclaim. That would have resulted in a jurisdictional problem. The

> relevant Rule of Court (Part 20, r.4) gave the Court a full discretionary power to allow amendments notwithstanding the expiration of a limitation provision. A more liberal position was established than that reflected in the rule in Weldon v. Neal (1887) 19 QBD 394 at p.395 per Lord Esher, MR.
>
> In Victoria there is a counterpart of Part 20 r.4 of the NSW Rules - see Rule 36.01(6). It mirrors section 34 of the Limitation of Actions Act 1958 which section, inserted in 1986, has the declared purpose of abrogating the rule in Weldon v. Neal." (emphasis mine)

I interpose that Rule 36.06 of the Rules, s20 of the *Supreme Court (Rules of Procedure) Act* and s48A of the *Limitation Act* similarly effect in this jurisdiction the abrogation of the Rule in *Weldon v Neal*. Ashley J continued at pp12-14:-

> "Because an amendment operates, ordinarily, from the date of the original document, an order granting amendment will have a retrospective effect. In having that effect a limitation defence otherwise available may be lost. The rule in Weldon v. Neal reflected concern at such an outcome. There can be no doubt that section 34 of the Limitation of Actions Act and the rules of court to which I have referred (see also RSC Ord.20,r.5 of the English Rules) were intended to free the courts from the limitations of the judge-made law in Weldon v. Neal. But that is not, of course, to say that the Court's discretion will always be exercised in favour of a grant of amendment. That would be no exercise of discretion at all. The circumstances in which amendment is sought, and the nature of amendment sought may vary greatly.
>
> From the standpoint of the plaintiff and Bridge, what is to be derived from the Rules and from the reference to Larcos is that the Court, in the particular circumstance of amendment of existing proceedings, may make an order which, by operating retrospectively (though not by specific court order)
> 13. will preclude availability of a limitation defence. Any analogy with the present problem seems to me to be fairly distant.

Counsel pointed to passages in the judgement of Rogers J. in Larcos which dealt with making an order as to joinder of new parties; see at p.296. The references were used only to support a conclusion that a date which was less retrospective than that ordinarily flowing from amendment could be selected as the date from which the amendment would take effect. The broad language of Part 20, r.1 of the rules was said to authorize such a course.
His Honour's reference to the two English cases dealing with joinder of parties could not, in my opinion, be read as authority for the proposition that joinder of parties may be effected in a manner that will preclude a limitation defence being successfully availed.

The two cases to which his Honour referred were Ketteman (in the Court of Appeal) and Liptons Cash Registers & Business Equipment Ltd v. Hugin (GB) Ltd [1982] 1 All ER 595.

In Liptons, Judge Hawser QC permitted joinder of a defendant, to operate as from date of amendment. His Honour acted on the footing that joinder, when ordered, would otherwise relate back to date of issue of the writ (an approach later rejected by the House of Lords in Ketteman, and by Dawson, J. in Bridge Shipping). Far from having retrospective intent, his Honour's order was designed to preclude such an effect, thereby preserving any limitation defence had by the new defendant as at the date of amendment.

In Ketteman v Hansel Properties Ltd, [1984] 1 WLR 1274, at p.1288, Lawton LJ. approved the course adopted by Judge Hawser in Liptons, whose purpose was to preserve any limitation defence available at date of amendment.

Counsel for the plaintiff and Bridge further pursued a submission that the passage in the judgement of Lawton L.J. at p.1285, to which Mr Strahan had referred was not authority against giving retrospective effect to commencement of proceedings in a case such as the present, because there proceedings had in due course been commenced against the added defendants; and the later order purported to undo or redo what had been done. In my opinion, there is substance to this criticism. Ketteman certainly contained factual features not found in the present case.

I said earlier that counsel for the plaintiff and for Bridge relied upon Darrell Lea Chocolate Shops Pty Ltd v. Spanish-Polish Shipping Co Inc [1990] 25 NSWLR 568. The plaintiff sought to join persons out of the jurisdiction both as plaintiff and defendant

in proceedings to recover the cost of repairs to machinery imported from Germany and there damaged.

Carruthers J. ordered that a plaintiff be added. There had been raised by the defendants a contention that a time bar created by the Hague/Visby Rules would run against this party. This was a matter of debate. His Honour said, at p.574:

> "The effect of Pt8, r11(3)(b) is that this amendment takes effect as from today. It was argued by the plaintiff, however, that I should exercise my overall discretion to relax the Rules, by directing that the amendment is to operate as from the date upon which the proceedings commenced. I am not prepared to accede to this application. It would require very persuasive circumstances (which do not exist here) to justify the suspension of this
> 14. rule. Indeed, I specifically reserve to the defendants the right to plead any limitation provisions which they conceive would operate as against Bauermeister."

It was submitted for the plaintiff and for Bridge that his Honour there implicitly recognized a power to abrogate the effect of the Rules so as to save an action that would otherwise be time-barred. Certainly the passage reads in such a way. However, the main emphasis of the applications before his Honour was such that I think it would be unwise to read too much into the passage to which counsel referred me.

Though counsel did not refer to the matter I gave consideration to whether decisions in the context of r5.12 [dealing with duration and renewal of originating process] could, by analogy, suggest the existence of a power such as was contended for. It is, in that context, clear that the period of validity of a writ for service may be extended notwithstanding expiry of a limitation period. In the end, however, it seems to me that the circumstances there are very different. They involve commencement of a proceeding within time and the curing by the Court of an irregularity consisting of failure of timely service.

Counsel for the plaintiff and Bridge were unable to refer me to any case where an order for joinder of a party had been made in a way that operated to defeat a limitation defence otherwise available to the added party." (emphasis mine)

I interpose that Mr Southwood could not refer this Court to any decisions to that effect, either. Ashley J continued at p14:-

> "Such a step is one of very great significance. It would involve, in substance, the court abrogating the effect of an Act of Parliament. In my opinion, it is not open. In other words, the power of the Court under r1.14(1)(b) or upon joinder under r9.06 does not extend to ordering that the proceedings against an added party be deemed to have commenced at a date prior to the making of the order, so as to preclude the added party availing itself of a limitation defence otherwise available. What I have said, I should add, need not and does not address the question whether the Court could properly make an order for joinder modifying the operation of r9.11 so as to preclude a limitation period expiring, to the disadvantage of the joining party, on a date after the making of the order." (emphasis mine)

Ashley J concluded at p16 that the Master's order of 5 June 1992 joining Tokumaru as a defendant and backdating the commencement of proceedings by the plaintiff against Tokumaru to 28 May 1992, should not have been made.

I respectfully agree with his Honour's reasoning and approach and apply it in this case; Rules 1.14(1)(b), 9.11(3)(a) and 9.06 of the *Supreme Court Rules (Victoria)* are similar to Rules 1.10(1)(b), 9.11(3)(a) and 9.06 of the Rules. In my opinion the authorities relied on by Mr Southwood do not support the proposition that this Court pursuant to r1.10 or r2.04 or otherwise has power when joining CTG as defendant under r9.06, to order that the action against CTG be deemed to have commenced on 24 February 1989, thereby precluding CTG from availing itself of the Limitation Act defence otherwise now available to it. To the contrary, applying Ashley J's conclusion in *Phillip Morris Ltd v Bridge Shipping Pty Ltd* (supra) at p14 (see p31) this Court has no power under r9.06

or r1.10(1)(b) to back-date the order sought (p1), so as to prevent the new defendant CTG from relying on that Limitation Act defence; cf. the effect of the differently-worded Supreme Court Rules (Queensland), O.3r13.

In any event, I would apply here the usual rule of practice that a plaintiff not be given leave under r9.06 to add a defendant, after the period of limitation applying to its claim against that defendant has already expired. This rule of practice is based on the concept that to allow such an addition would serve no useful purpose because that the new defendant, as a party, would have the unanswerable defence of a time-bar. Rule 9.11(3)(a) reflects this basis for the rule of practice (and not the former assumed basis that an addition relates back to the date of the writ, so that the newly-added defendant would be deprived of an accrued Limitation Act defence). The distinction Mr Southwood draws at p10 is not germane; the fact is that CTG appears to have an unanswerable time-bar defence at this time. The second submission (p7-8) fails.

The order

I turn to the question whether the order sought (p1) should be made. I bear in mind Mr Southwood's submissions (transcript pp21-22) to the effect that the justice of the case favours the granting of the application; and that the Court should keep in mind the potential abuse that could be perpetrated by a company-defendant to gain advantage of a Limitation Act defence - for example, by having itself de-registered under s574 of the Law after being sued, without the

plaintiff's knowledge. I have no doubt that, in the circumstances, the justice of this application is all one way, and favours the plaintiff. I do not consider that the Court of Appeal intended that its interlocutory order of 9 December 1992 should preclude the giving of subsequent directions under s574(5) of the Law, once the registration of CTG was reinstated under s574(3); nor does its order have that effect.

Accordingly, I now order pursuant to s574(5) of the Law that CTG be joined as a defendant in this action, and that the joinder be effective on and from the date of the issue of the writ, 24 February 1989. Pursuant to r59.02(1) I direct that this order take effect nunc pro tunc with the Master's order of 18 February 1993 (p6), to take account of the requirement in s574(5) that the directions be "in an order under subsection (3)".

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